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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRED M. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 24, 1984

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QUESTIONS PRESENTED

1. When the court of appeals erroneously portrayed the record to reach an otherwise unattainable result, was petitioner not effectively denied appellate review of his conviction.

2. Upon an accurate reading of the record, does not the court of appeals' opinion sustaining petitioner's mistaken street arrest for another collide with *United States v. Rosario*, 543 F.2d 6 (2d Cir. 1976), and also with the suggested resolution of an issue left open by the Court in *Hill v. California*, 401 U.S. 797 (1971).

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OPINIONS BELOW

The opinion of the court of appeals appears in App. A, pp. 1a-9a. The opinion of the district court appears in App. B, pp. 10a-19a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on January 17, 1984, and a combined petition for rehearing and suggestion for rehearing en banc was filed on January 23, 1984. Both requests were denied on February 3, 1984. The time within which to file a petition for a writ of certiorari extends to and includes April 3, 1984. the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

STATEMENT OF THE CASE

Upon Larry Mathis' indictment for murder a fugitive warrant was issued for his arrest. When petitioner was spotted on the street one day in proximity to a car usually driven by the fugitive, FBI agents mistakenly arrested him and recovered a pistol from his person. Other than the fact that petitioner and Mathis were black males in their early thirties with short cropped hair, their appearances were quite dissimilar in that *petitioner:*

1. facially looked nothing at all like Mathis;

2. was clean shaven while Mathis had a short beard and mustache;

3. was older, two inches taller (5'11" vs. 6'1"), ten pounds lighter (180 lbs. vs. 170 lbs.), and lighter complected than Mathis.

Additionally, at the time petitioner was arrested, each of the arresting agents possessed clear mug shot photographs of both men.[1]

On the day of the arrest, September 24, 1982, FBI agents were tipped off that an armed and dangerous Larry Mathis was inside an apartment in a southwest Washington highrise – Tiber Island – listed to the female owner of a Dodge vehicle that Mathis was known to be driving. The agents were also told that the car was parked in front of the building. Upon arriving there

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[1]The agents coincidentally had petitioner's photograph among several others, because he was known to be one of Mathis' associates.

at about 6:30 p.m., after intercepting an FBI broadcast concerning the tip, agent Debby Martin saw the suspect Dodge and petitioner near it. Shortly thereafter supervising agent Stephen Mardigian arrived, drove down the block to view the Dodge and was surprised to see a black male leaning against the car. Thus viewing the person for several seconds at dusk, Mardigian concluded that he strongly resembled the photograph of Mathis despite a clean shaven face. Upon recontacting the tipster, Mardigian was advised that Mathis had left the building. With events in that posture a white Mercedes pulled up to petitioner occupied by an unknown male driver and a female child. When petitioner entered the rear seat of the car and it started off, Mardigian ordered it stopped. Agent George Chmiel did so at gunpoint. When Mardigian responded to that location, he and Chmiel removed petitioner from the car and handcuffed him face down on the ground. Upon bringing him to his feet, they noticed a gun in his waistband and the fact that this was not Larry Mathis.

The following comparison details the factual disparity between the opinion of the court of appeals and the record.

OPINION	RECORD
1. Omitted.	2. The clear photographs of Mathis and Glover – possessed by all of the FBI agents – reflect their facial dissimilarity. "Q. In fact, you would say they're quite dissimilar in their facial appearance. "A. That's right." (Tr. 35, Det. Lee) • • • • "Q. . . . Looking at those photos, those people don't

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	appear similar to you; do they? A. Not really." (Tr. 69, FBI (Agent John Heieck) • • • • "The court has reviewed the pictures of Fred Glover and Larry Mathis and agrees with the agents who testified that, in their pictures, these individuals do not look alike." (District Judge's opinion, App. B, p. 17a)
2. "Glover was a little . . . darker . . . .", (App. A, p. 2a)	2. "Q. And Larry Mathis is about a shade darker than Glover? A. That's right . . . . Just a little darker tint of skin, pigmentation . . . . (Tr. 34, Det. Lee)
3. "Through her rearview mirror Agent Martin noticed a black male leaning against the Dodge in a manner which she thought indicated he was either its owner or knew who was (Tr. 110)." (App. A, p. 4a)	3. Agent Martin noticed a "Negro male standing in the vicinity of the car . . . just standing there, waiting." (Tr. 109) He stood some "three to ten feet from the car." (Tr. 130) He maintained this distance from he vehicle for about "three to five minutes." (Tr. 129) Thereafter, he began leaning on the sidewalk "side of the car" (Tr. 130) in a "quite comfortable" position. (Tr. 110) He thus leaned against it for between two and five minutes and again, "ap-

OPINION	RECORD
	peared to be waiting . . . ." (Tr. 132-133) "He was leaning on the car in such a way that I wouldn't lean on a car unless I knew who owned it or it were my car." (Tr. 110) At that juncture the white Mercedes pulled up. (Tr. 133-134)
4. "FBI agent Deborah Martin . . . received a radio message . . . which stated that 'the individual we had been looking for had just arrived at the apartment and that the car was parked out front.' (Tr. 103) She immediately drove to the N Street address and saw the Dodge parked nearby". (App. A, p. 3a)	4. The car was parked "30 or 40 feet, I guess, maybe a little bit longer" from the entrance to the N Street apartment building (Tr. 306, Agent Chmiel); in front of some townhouses. (Tr. 128; GX 6 in the record on appeal.)
* * * *	
"While on surveillance, the agents were informed that Mathis had arrived at the N Street apartment and that the Dodge was parked out front." (App. A, p. 5a)	
5. "Deborah Martin . . . at about 7 p.m. on September 24th, she received a radio message intended for Agent Heieck which stated that [Mathis was at the apartment.]" (App. A, p. 3a)	5. Agent Martin left work on the evening in question "shortly after six p.m." (Tr. 102) Soon thereafter she received a radio message intended for agent Heieck (Tr. 102), responded to the scene and parked (Tr. 104-106), "somewhere betwen 6:15 and 6:30" (Tr. 107)

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6. "Mardigian sought to verify the location of the Dodge and rode with Agent Vatter to the position where it was sighted. As they approached the Dodge, Mardigian was startled to see a black male leaning against it. He was able to view the man for only a few seconds, but nevertheless concluded that the man 'very strongly resembled the photograph of Mathis although he didn't have any noticeable facial hair (Tr. 160-61, 187-88)" (App. A, pp. 3a-4a)

7. "Mardigian did have some doubt whether the individual leaning against the car was Mathis." (App. A, p. 6a)

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6. "As I approached the vehicle – was riding the passenger seat – unexpectedly, I observed a Negro male standing on the reverse side of the vehicle leaning against it." (Tr. 158)

"Q. You saw him from the shoulders up.

A. Yes. Just below the shoulders." (Tr. 185)

* * * *

"About from the shoulders up, because the top of the car would have cut off from there below from visual observation." (Tr. 185)

"Q. Were you able to get a full view face image of him?

A. He may have had his head turned sideways. I didn't get a straight-on view of his face." (Tr. 160)

The closest he got to the person was 10 to 15 feet and the scan of him lasted "just a few seconds." (Tr. 162) He was certain that this person did not have a beard (Tr. 187-188)

7. "When this man was seen, very shortly after being seen, he was seen getting into another car and leaving. We couldn't allow this

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	to happen without identifying him. . . . We had to stop the vehicle if for nothing more than just to ascertain whose identity that was. . . I believed that the person who was being stopped very possibly was the fugitive being sought." (Tr. 282). ". . . [I]t had to be considered that the man leaning on the car was Larry Mathis. He fit the same general descriptions, at least from a distance." (Tr. 282) (Agent Mardigian's grand jury testimony which he adopted as true and correct at the hearing (Tr. 283).
8. Omitted	8. This was an evening work day and a few people were on the street who "trickled back and forth." (Tr. 312) Furthermore, this Southwest neighorhood was racially mixed. "Q. It is not unusual to see young black males around the area in their mid-30's? A. No. Q. Short hair was not uncommon at that time and place? A. Certainly not." (Tr. 312, Agent Chmiel)

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9. "Agents quickly ran toward [the Mercedes] with drawn guns. Agent Chmiel pushed his gun through the driver's side window, pointed it at the passenger in the rear seat and said 'FBI – don't move Mathis' (Tr. 302). The occupant of the rear seat was rapidly hustled out of the car and placed face-down on the ground." (App. A, p. 4a)	9. Agent Chmiel had been an FBI agent for 12 years. His assignment was apprehending bank robbers and fugitives (Tr. 290-291). Eight to ten other armed agents converged on the car with him. (Tr. 126, 139, 302-303) At the time in question Agent Chmiel, although he had not seen Larry Mathis in person, was familiar with various police photographs of him from other investigations commencing in 1979 or 1980 (Tr. 309. At the time of the arrest herein Agent Chmiel "had a photograph that I was carrying around with me, my own photograph of Mr. Mathis." (Tr. 300-301). As petitioner sat in the rear of the stopped vehicle, Chmiel approached and pushed his gun "through the driver's side window straight into the back seat . . . . (Tr. 302)
• • • •	"The gun was pointed right directly at [petitioner]" (Tr. 302)
"The only difficulty is whether the interval of about thirty seconds during which Chmiel had his gun trained on Glover was sufficient under the circumstances to lead a reasonable man to realize that he had the wrong person and that he therefore should not proceed with the arrest. When these circumstances are recited, however, we believe the question answers itself." (App. A, p. 7a)	"I told him not to move. I waited. I did not go into the back seat. I waited for other agents to come up and open the back door and remove him, help remove him." (Tr. 302-303)
	• • • •

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Q. . . . You saw him?

A. Yes.

Q. He could see you, and you could see him?

A. That is correct.

Q. And you were watching him really carefully because he was armed and dangerous; is that correct?

A. That is correct.

Q. You looked at his face?

A. That is correct." (Tr. 320)

• • • •

"Q. And having looked at his face right square, you could see that he didn't have a beard; couldn't you?

A. Well, you could see he didn't have a beard, yes." (Tr. 322)

• • • •

Q. Are you telling us that [petitioner] as he sat – you saw him clearly, didn't you, his face in the car?

A. I saw him clearly. . ." (Tr. 323).

As to the time involved in this confrontation, Agent Chmiel estimated that it lasted, "maybe 30 seconds or maybe a minute . . . ." (Tr. 321).

9a Omitted

9a The reason it took so long to remove petitioner from the

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rear seat, was because Chmiel took no further action until his supervisor, Mardigian arrived. (Tr. 303) At the time petitioner entered the Mercedes, Mardigian had returned to his surveillance vehicle parked out of sight about a block away on Fourth Street. (Tr. 164) Upon giving the order to "stop the vehicle and not allow him to leave" (Tr. 165), Mardigian then drove down N Street from Fourth, "pulled around, in front of the circle, and directly up behind agent Schimmel's [sic] car." (Tr. 166) He then exited his vehible with a shotgun, and approached the Mercedes (Tr. 166) where he and Chmiel "both took the individual out of the back seat." (Tr. 303)

FURTHER ERRORS OF ANOTHER KIND

1. The opinion correctly first states: "None of the FBI agents involved in the search had previously seen Mathis." (App. A, p. 2a) The opinion then provides us with the following non sequitur: "Unlike Mardigian, Chmiel had never actually seen Mathis before, although he had seen his picture." (App. a, p. 7a) The only possible explanation for this clearly erroneous conclusion, is that the writer of the opinion equated Mardigian's viewing of Glover by the Dodge with that of Mathis.[2]

[2]The opinion of the court of appeals reproduced in Appendix A, pp. 1a-9a is a *photographic* reproduction of the slip opinion we obtained from the court. There is, accordingly, no possibility of printing errors in our recitation of that opinion.

2. The opinion also seeks momentum from the fact that Mathis was "seen on August 6th as a passenger in a Mercedes Benz driven by Glover . . ." (App. A, p. 3a), and the fact that, on the day of the arrest, the person thought to be Mathis entered a "white Mercedes" that had "pulled up." (App. A, p. 4a) The sought-after inference that these cars were the same is *extremely unfair.* This is true, because as experienced counsel, we had specifically negated that conclusion by testimony to the effect that the Mercedes seen on August 6 was blue (Tr. 32). The trial court also perceiving the probable cause significance if the cars were the same, similarly probed that issue and neutralized the two sightings.

> "The Court: I believe you testified that the Mercedes-Benz that you noticed that August evening was blue, not white; is that correct?
> The witness: Yes. . ." (Tr. 47, Det. Lee)

3. Of little significance but reflective, of the tenor of the opinion is the citation of *Hill v. California,* as 401 U.S. 777 (App. A, p. 5a).[3]

4. The instant opinion also criticizes the second circuit for not comprehending this Court's ruling in *Hill v. California,* 401 U.S. 797 (1971).

In referring to *United States v. Rosario,* 543 F.2d 6 (2d Cir. 1976), the opinion observes:

> "We decline to follow *Rosario* because the majority in that case . . . employed what we conceive to be the wrong analysis . . . . The *Rosario* majority focused on whether there was probable cause to arrest Rosario when the correct inquiry, under *Hill,* should have been whether there was probable cause to arrest the man for whom the police mistook Rosario and whether the mistake in identification was reasonable." (App. A, p. 8a)

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[3]We have been informed by West Publishing Co. that its editors have discovered and corrected this citation error for publication of the opinion in the advance sheet of March 12, 1984.

The mistake, however, was not engendered by the Second Circuit, but rather by the ambitious undertaking of the writer of this opinion. The misreading of *Rosario* was probably triggered by the statement therein that:

> "The issue before us is whether the court was correct in finding a lack of probable cause for the arrest of Rosario." 543 F.2d at 7.

In making this observation, however, the court was not requiring probable cause to arrest Rosario the stranger, but rather probable cause to arrest one named Rosario who stood in the shoes of Gonzalez's accomplice. This is absolutely clear, because the *Rosario* majority opinion proceeds to apply verbatim the very test it is criticized herein for not applying.

> "In assessing probable cause it would be irrelevant that the person arrested turned out not to be Gonzalez's confederate in the sales to agent Balmer if the police had probable cause to arrest the confederate and had made an understandable mistake in arresting Rosario. *Hill v. California,* 401 U.S. 797, 803-805 . . . " 543 F.2d at 8.

5. In finding objectively reasonable Mardigian's conclusion that Glover, at the time, "strongly resembled" Mathis, the opinion states that "[t]he most telling difference between Glover and Mathis was Glover's [observed] lack of facial hair." (App A, p. 6a) The most telling difference was actually, however, the omitted fact that these two people did not look anything alike.[4]

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[4]Although every one of the errors presently outlined was alluded to in our combined petition for rehearing and suggestion for rehearing en banc, no concern was expressed by the court and the opinion was never modified in any way to our knowledge.

REASONS FOR GRANTING THE PETITION

A.

Instead of striving for technical merit, the instant opinion achieves high marks for artistic impression. While this is, no doubt, a valued goal in another arena, that result here engenders a judgment on a qualitatively different set of facts than we submitted to the court of appeals.[5] While in our long experience the instant opinion represents a departure from the usually well-drawn factual outlines by the court below, such judicial precision may not be universally observed by the Court. Recently in *Marshall v. Walker,* No. 83-151, three members of the Court dissented from the denial of the petition for a writ of certiorari, complaining, *inter alia,* that the court of appeals for the Sixth Circuit reached its result by a selective portrayal of the record. 34 Cr. L. 4065-4066 (November 2, 1983). See also *Sumner v. Mata,* 449 U.S. 539 (1981). Accordingly, the time may be ripe for the Court to correct these rather freewheeling factual summaries by the lower courts.[6]

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[5]We note that our assault upon the factual aspect of the opinion does not implicate the Court's long standing rule of accepting concurrent findings by the lower courts on disputed questions of fact, debated by the majority and dissenting opinions in *Neil v. Biggers,* 409 U.S. 188, 193 n.3, 202 (1972). This is true because the record is undisputed factually by petitioner since he presented no evidence, and relies himself upon the testimony of one police officer and three FBI agents called as witnesses by the government. Accordingly, we do not fault the court of appeals for reaching an erroneous result from the facts, but rather for erroneously portraying the undisputed facts of record.

[6]It is also unusual that the court of appeals never alluded to the district court's opinion (App. B, pp. 10a-19a) sustaining petitioner's arrest. It probably did not do so for the reason stated in our brief, *i.e.,* the district court also seriously misstated the record on an important fact. In outlining Agent Mardigian's testimony – without the benefit of a transcript – the district judge *omitted* the fact that the agent observed that the suspect had no beard (App. B, p. 14a). Accordingly, in reaching its legal conclusion, the district judge erroneously observed in part:

Additionally, we have here a "blatant misreading of a decision by the United States Court of Appeals" for the Second Circuit in *United States v. Rosario, supra.* That kind of error by a state supreme court also caused two members of the Court to recently dissent from the denial of a petition for a writ of certiorari in *Young v. Georgia,* No. 83-5365 (34 Cr. L. 4145 *et seq.* January 11, 1984). Since the instant petition reveals a combination of both errors in one opinion, granting of the petition may not be an unrealistic expectation of petitioner. Moreover, this seriously marred factual and legal portrayal by the court of appeals had the effect of denying to petitioner any meaningful appellate review of his conviction, thus implicating Rule 17.1(a) of the Rules of this Court. In our judgment, the "court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, . . ., as to call for an exercise of this Court's power of supervision."[7]

"The court has reviewed the pictures of Fred Glover and Larry Mathis and agrees with the agents who testified that, in their pictures, these individuals do not look alike. Other facts which caused them to question were that Mathis was two inchest (*sic*) shorter and ten pounds heavier than Glover and had a beard. It should be noted, however, that from a distance *these differences may not have been as discernable."* (App. B, p. 17a (Emphasis supplied).

[7]Normally, this Court as do all courts of appeals heavily relies upon a fair and accurate statement of the case contained in the brief for the United States. We recently alluded to the importance of these factual summaries provided by the briefs for the parties in *Richardson v. United States,* No. 83-2113 (Reply Brief for Petitioner, n.15, pp. 19-20). We can only imagine the displeasure in this Court, had the United States submitted a brief equivalent to the instant opinion.

B.

When the complete and accurate record is considered, it is clear that petitioner's arrest was invalid under *Hill* v. *California,* 401 U.S. 797 (1971).

At the time of arrest it is fair to conclude that it was known that Larry Mathis was in the habit of driving the Dodge automobile and visiting the apartment it was registered to, *i.e.,* 429 N Street, Southwest, Apartment 501. We can also conclude that at about 6:30 p.m. the agents could reasonably believe that an armed and dangerous Larry Mathis was inside the apartment. At that point a black male in casual dress and with somewhat similar physical characteristics to Mathis was observed in the vicinity of the suspect Dodge apparently waiting for someone. Certainly this would arouse *suspicion* and the need for further inquiry or observation but not probable cause to arrest this person whose face had not been seen. This lack of probable cause is apparent because of the following:

1. This is a racially mixed neighborhood where similarly appearing males is common.

2. The hour is reasonable and there were people on the street.

3. The black male has not been pointed out as the suspect nor has he been seen to exit the apartment building.

4. He is at a location some thirty to forty feet from the entrance to the building in front of some townhouses.

5. The person is standing at a distance of between three and ten feet from the Dodge, totally unassociated with it.

6. This person exhibits no furtive behavior compatible with a fugitive on the run.

After so standing for from three to five minutes, the black male began to lean against the side of the car in a "comfortable" position looking out into the street, still apparently waiting for someone. He remained in this position for another two to five minutes before the Mercedes picked him up. Certainly his respite from standing by leaning against the car adds nothing to

probable cause, for that behavior is, no doubt, common to every urban area of the country. Furthermore, he did nothing to demonstrate any connection with or dominion and control over the vehicle such as unlocking it, sitting in it, or tinkering with it. His assumed status of a person waiting for another was confirmed when the Mercedes pulled up and he got in; thus, severing any even imagined relationship of his with the Dodge. Not without some moment in further undercutting probable cause to believe that this was Mathis is the fact that every agent who observed this black male under varying lighting conditions – Debby Martin for up to ten minutes while he was in several shifting positions – was unable to say that his face resembled Mathis's. They obviously could not do so because petitioner's facial appearance is concededly dissimilar from that of Larry Mathis.

The remaining question is whether the testimony of Agent Mardigian when placed in the totality of the circumstances alters the apparent lack of probable cause to arrest petitioner. After arriving on the scene, the source told him that the suspect – wearing a hat and coat – was in the apartment. Upon riding through the block with another agent in order to view the Dodge, Agent Mardigian was surprised to see a black male leaning against it who he could only see from the shoulders up. He took a sideward glance at the person lasting several seconds as he drove by so as not to arouse his suspicion. It was now about 7:00 p.m., dusk, with shadows over the area. Upon this scant sideview of the suspect's beardless face, Mardigian concluded that he "very strongly resembled the photograph" of Mathis. This "subjective good-faith belief," however, did "not in itself justify . . . the arrest . . . ." 401 U.S. at 804. That result is not contradicted by the fact that Mardigian's source now told him that Mathis had left the apartment. The reason is clear. It is impossible to objectively conclude that a person who facially looks nothing at all like the fugitive – in addition to not having a beard – in fact, very strongly resembles him.[8] A critical fact

[8]The *facial* mug shot relied on by Mardigian is included in the record on appeal along with petitioner's mug shot.

controverting probable cause which was omitted from the court of appeals' opinion. Indeed, the observed absence of the beard should itself, have caused Mardigian to refrain from making an arrest.

In these circumstances, we believe that the instant case conflicts with *United States* v. *Rosario,* 543 F.2d 6 (2d Cir. 1976), which presented a stronger factual predicate for sustaining the arrest. At bottom, the court in *Rosario* was apparently quite concerned that if the arrest therein was sustained, it might result in future indiscriminate arrests of Hispanics in New York City.

> "[T]he physical description of [the] confederate . . . would fit a very large group of ordinary young men." 543 F.2d at 8.

Similarly, the District of Columbia has a majority black population whose male members should not be amenable to an interchangeable arrest status.

Furthermore, judging by agent Mardigian's — adopted as true and accurate — grand jury testimony (Tr. 283), he did not believe that probable cause existed to arrest the suspect. "We had to stop the vehicle if for nothing more than just to ascertain whose identity that was . . . ." (Tr. 282) And, in fact, his consistent orders were not to arrest, but merely to "stop the vehicle and not allow him (petitioner) to leave." (Tr. 165) It is obvious that had the Mercedes not pulled up and petitioner entered it, the course taken by the agents would have been in the nature of a routine check of petitioner's identity. That unexpected event, however, did not generate probable cause to arrest, when without it, such threshold had not been reached. The agents could have lawfully acted *almost* precisely as they did in order to ascertain whether or not it was Mathis in the rear seat. For in this jurisdiction a pre-arrest inquiry at gunpoint to determine identity, in the circumstances presented, would have been proper. *United States* v. *White,* 208 U.S. App. D.C. 289, 648 F.2d 29 (1981).

We are also of the view that the instant opinion erroneously decided an issue not resolved by *Hill* v. *California, supra.*

In sustaining the search therein, the Court considered and rejected those factors relied upon to negate the identification *after* the arrest on probable cause but prior to that search.

1. The arrestee urged that he was Miller not Hill and was in the apartment waiting for the latter.

2. The arrestee produced identification showing he was Miller and not Hill.

3. The arrestee disclaimed any knowledge of guns or stolen property.

All of these factors were neutralized by the presence of "an automatic pistol and a clip of ammunition . . . lying in plain view on a coffee table in the living room where the arrest took place." 401 U.S. at 799. With the identification thus bolstered or corroborated by the weapon, the Court was justified in concluding that "aliases and false identifications are not uncommon." 401 U.S. at 803. Although not spelled out by the Court, we believe that this aspect of the *Hill* opinion clearly suggests that if after a probable cause arrest, but prior to search, it unambiguously appears that the arrestee is the wrong person, then all police intrusions aimed at him must cease. Thus, once agent Chmiel had petitioner immobilized and clearly saw his face for up to one minute, he was obliged not to go further. This is true whether or not petitioner was under arrest at that moment. All of the subjective good-faith in the world was to no avail, when Chmiel then intently observed a person who looked nothing at all like the fugitive whose picture he was carrying around with him.

Thus, at the critical moment in question, an FBI agent whose everyday work dealt with armed and dangerous bank robbers and fugitives, was on the scene for the very purpose of apprehending an armed and dangerous suspect who he had immobilized via a gun pointed at his head. Other possible fears were allayed by the presence of so much back-up FBI firepower. We believe it would be unrealistic in these circumstances to attribute image blurring nervousness to Agent Chmiel.

Although the opinion alluded to our argument on this score (App. A., p.7a), it did not actually recognize or resolve the issue left open in *Hill*. What it did do, however, was to assume that such intrusions must cease when it is realized that the wrong suspects in custody, and then proceeded to erroneously decide the question upon an inaccurate factual summary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1176

UNITED STATES OF AMERICA

v.

FRED M. GLOVER aka BLACKBUSTER, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(D.C. Criminal No. 82-00315-01)

Argued September 30, 1983

Decided January 17, 1984

Alan M. Palmer, for appellant.

Mary Incontro, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney (at the time the brief was filed), *Michael W. Farrell* and *Theodore A. Shmanda*, Assistant United States Attorneys were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: BORK and SCALIA, *Circuit Judges*, and WILLIAMS,* *Senior District Judge*, United States District Court for the Central District of California.

Opinion for the Court filed by *Senior District Judge* WILLIAMS.

WILLIAMS, *Senior District Judge*: This case concerns the validity of a warrantless arrest of appellant Glover for carrying a gun without a license. The arresting officers mistook Glover for a fugitive they were seeking named Larry Mathis. Glover moved to suppress the gun as evidence but the District Court denied his motion. After a bench trial on stipulated evidence Glover was convicted of a violation of D.C. Code § 22-3204. We affirm.

I.

Larry Mathis and two other men were indicted for a murder which occurred on September 25th, 1981. In May, 1982, FBI agents became involved in the case because the police received confidential information that Mathis was connected to death threats against certain homicide and narcotics officers and the federal prosecutor who handled the Grand Jury investigation which resulted in the indictment of Mathis and the others (Tr. 13-14). On July 30th, 1982, a bench warrant was issued for Mathis's arrest. He was considered armed and dangerous and his capture was eagerly sought.

None of the FBI agents involved in the search had previously seen Mathis. They were supplied with photographs of him and of his known associates, including Glover. Both Mathis and Glover are black males; at that time Mathis was 32 years old, dark complexioned, 5'11" tall, weighed 180 pounds and wore a short beard and mustache. Glover was a little taller, darker and older, and was described as weighing 10 pounds less than

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Mathis. He had no facial hair in the photograph of him supplied to the FBI. Both these men were well-known to the local police involved in the search for Mathis.

The pace of the search for Mathis greatly accelerated in September. Several confidential civilian sources provided information, which in conjunction with police observations established the following: (a) Mathis knew he was wanted and was running (Tr. 8); (b) he was seen on August 6th as a passenger in a Mercedes Benz driven by Glover in the 900 block of French Street (Tr. 18); (c) he was seen on September 15th in the same block driving a dark-colored Dodge bearing D.C. license plate number 736-798; (d) the car was determined to be registered to Susie May Herring of 429 N Street, S.W., apartment 501 (Tr. 23); (e) on September 22nd, an officer saw Mathis driving the same Dodge but lost it in pursuit (Tr. 25-26); and (f) police sources had seen Mathis and Glover enter the N Street apartment building and go to apartment 501 (Tr. 55-57, 75-76).

Day and night surveillance of the N Street apartment took place between September 22nd and 24th. FBI agent Deborah Martin made several spot checks of the area and at about 7 p.m. on September 24th, she received a radio message intended for agent Heieck which stated that "the individual we had been looking for had just arrived at the apartment and that the car was parked out front." (Tr. 103). She immediately drove to the N Street address and saw the Dodge parked nearby. She made herself inconspicuous and awaited the expected arrival of other units.

Meanwhile, agent Mardigian formulated a plan to contain movement of the Dodge and at the same time to arrest Mathis who was thought to be in apartment 501 (Tr. 156). Mardigian sought to verify the location of the Dodge and rode with agent Vatter to the position where it was sighted. As they approached the Dodge, Mardigian was startled to see a black male leaning

against it. He was able to view the man for only a few seconds, but nevertheless concluded that the man "very strongly resembled the photograph" of Mathis although he didn't have any noticeable facial hair. (Tr. 160-61, 187-88). When he was out of the man's view Mardigian announced to other agents that he had seen an individual leaning against the Dodge. (Tr. 160). Through her rear-view mirror agent Martin noticed a black male leaning against the Dodge in a manner which she thought indicated he was either its owner or knew who was (Tr. 110).

Using a mobile telephone in his car Mardigian called his civilian source within the apartment building to find out whether Mathis had left the building. The source stated that the person they were looking for had left the building and was no longer wearing a hat or coat.[1] At this point apparently, Mardigian notified other agents by radio that the man was Mathis. (Tr. 110-12). Suddenly an unexpected event occurred which caused the immediate scrapping of the containment plan the agents had decided upon. A white Mercedes pulled up near the Dodge and the man who had been leaning against it entered the rear seat of the Mercedes and it drove away. Agent Mardigian thought the man leaning against the car was Mathis and that he was about to escape. Using his radio he called other agents and ordered the car stopped. Agents quickly ran toward it with drawn guns. Agent Chmiel pushed his gun through the driver's side window, pointed it at the passenger in the rear seat and said "FBI—don't move Mathis." (Tr. 302). The occupant of the rear seat was rapidly hustled out of the car and placed face-down on the ground. After handcuffing him, Mardigian attempted to assist him to his feet and noticed that he had a gun in his waistband. As soon as

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[1] An earlier report from the informant indicated that Mathis was wearing a brown felt hat and a green leather jacket (Tr. 188).

the arrested person was brought to his feet the agents realized he was not Mathis.

II.

The arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought. *Hill v. California*, 401 U.S. 777, 802 (1971); *United States v. McEachern*, 675 F.2d 618, 621 (4th Cir. 1982); *Sanders v. United States*, 339 A.2d 373, 379 (D.C. Ct. of Appeals 1975). The agents in this case clearly had probable cause to arrest Mathis and possessed a warrant for his arrest. We must, therefore, address the remaining question whether their belief that appellant Glover was Mathis was reasonable.

The agents' subjective good-faith belief alone is insufficient to validate the arrest. *Hill*, 401 U.S. at 804. The reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances surrounding the arrest. *United States v. Allen*, 629 F.2d 51, 56 (D.C. Cir. 1980); *United States v. Young*, 598 F.2d 296, 298 (D.C. Cir. 1979). Thus, the Court must consider the facts as a whole to determine whether there is a reasonable basis for the agents' belief that Glover was the fugitive Mathis.

In *Hill*, the Supreme Court noted that "sufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment." 401 U.S. at 804. The agents established that Mathis had been seen driving the Dodge car on at least two recent occasions. Further, Mathis and Glover had been seen entering the apartment of the woman who owned the Dodge. While on surveillance, the agents were informed that Mathis had arrived at the N Street apartment and that the Dodge was parked out front. Appellant was seen leaning against the car and agent Mardigian felt he "strongly resembled" Mathis. Appellant and Mathis were similar physically,

a difference of approximately ten pounds in weight and two inches in height is negligible especially when a person is being viewed from a distance as was the case here. Further, although Glover and Mathis had different complexions, such nuances are difficult to distinguish under the twilight conditions the agents faced. The most telling difference between Glover and Mathis was Glover's lack of facial hair. Mardigian did not perceive any noticeable facial hair on the man leaning against the car. It is not unreasonable, however, for one to assume that a dangerous criminal on the run would eliminate his most telling characteristic, a beard.

Mardigian did have some doubt whether the individual leaning against the car was Mathis. In such cases the officer must make immediate reasonable efforts to confirm the suspect's identity. *Sanders v. United States*, 339 A.2d at 379. Mardigian telephoned his civilian source inside the building who informed him that the person they were looking for had left the building and was not wearing the hat and coat he wore when he came in. The person leaning against the Dodge was not wearing a hat or coat. Given this information, Mardigian could reasonably reaffirm his belief that the person leaning against the Dodge was Mathis. The facts establish that there was "sufficient probability" that the man leaning against the Dodge was Mathis and the agents' mistake is understandable.

The sudden appearance of the Mercedes on the scene is a factor in the agents' conduct which this court cannot ignore. Agent Mardigian was convinced that it was Mathis entering the Mercedes and he did not want to let a dangerous criminal escape. Thus, "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training," *United States v. Young*, 598 F.2d at 298, the arrest of Glover was "a reasonable response to the situation facing [the agents] at the time." *Hill*, 401 U.S. at 804. We are con-

vinced that had the agents even suspected that the occupant of the car was not Mathis, they would have refrained from springing the trap. It is highly conceivable that their mistake may have alerted an onlooking Mathis and alerted him to flee. Thus, up until the moment that Chmiel pushed his gun through the driver's window and pointed it at Glover, it was reasonable for the agents to believe that the man they were arresting was Mathis. The only difficulty is whether the interval of about thirty seconds during which Chmiel had his gun trained on Glover was sufficient under the circumstances to lead a reasonable man to realize that he had the wrong person and that he therefore should not proceed with the arrest. When these circumstances are recited, however, we believe the question answers itself. Unlike Mardigian, Chmiel had never actually seen Mathis before, although he had seen his picture. He was looking at Glover, who was in the back seat of the car, through the driver's window, in the twilight. The situation was very tense. Given all the reasons Chmiel had for believing the man in the car was Mathis, whose extreme dangerousness had been emphasized by the teletype accompanying the warrant for his arrest, it would be quite reasonable for an agent to spend those thirty seconds wondering whether the man in the car was about to pull a gun rather than conducting a mental check of his identification. Under the circumstances, Chmiel's failure to realize that the man in the car was not Mathis and his actions in proceeding with the arrest were justified under the standards of *Hill* and *Young*, *supra*.

Appellant cites *United States v. Rosario*, 543 F.2d 6 (2d Cir. 1976) and *State v. Frazier*, 318 N.W.2d 42 (S. Ct. Minn. 1982) as support for his position that it was unreasonable for the agents to mistake him for Mathis. In *Rosario* the police were after a narcotics dealer named Gonzalez. At each drug transaction between Gonzalez and an undercover agent, another man named "Angel" was present and participated in the

transaction. When Gonzalez was arrested another man was present and when asked to identify himself, he responded "Angel." Upon hearing the name Angel, the officer arrested the man and a subsequent search of his person resulted in the discovery of heroin. The arrestee, Angelo Rosario, was not Gonzalez's accomplice. The Second Circuit found there was no "probable cause" to arrest Rosario and affirmed the District Court's order suppressing the evidence.

We decline to follow *Rosario* because the majority in that case, whether or not it reached the correct result, employed what we conceive to be the wrong analysis. The police arrested Angel Rosario under the mistaken impression that he was the "Angel" who had helped Gonzalez sell heroin to the police. Similarly, in this case, the defendant was arrested on the belief that he was the sought-after fugitive, Larry Mathis. The *Rosario* majority focused on whether there was probable cause to arrest Rosario when the correct inquiry, under *Hill*, should have been whether there was probable cause to arrest the man for whom the police mistook Rosario and whether the mistake in identification was reasonable. We employ the *Hill* test here. There was a warrant for the arrest of Mathis and we think mistaking Glover for Mathis was reasonable under the circumstances.

In *Frazier* the police had a warrant for the arrest of one Terri Norman. While on duty, police officers saw defendant outside a bar at which the person sought had been seen earlier. The officers were about 500 feet from the defendant and in a dimly lit area. Nevertheless, they concluded that defendant was the person they were looking for and arrested her. A gun for which defendant did not have a license was found in her purse. The court suppressed the gun as evidence, ruling that the defendant's arrest was illegal because she did not look like the suspect and the arrest did not occur at the suspect's residence or at a place which the police reliably knew she

frequented. The court concluded that the police officers acted hastily in deciding that defendant was the suspect.

In this case, there was nothing hasty about the way the agents determined that appellant was the fugitive Mathis they were seeking. The agents consulted informants who provided information which buttressed the agents' belief that the man leaning against the Dodge was Mathis. Further, Mathis was known to drive the Dodge and to visit the owner of the car. Thus, the agents were in an area that Mathis frequented. We find the agents' mistake to be reasonable and affirm the District Court's order.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	)	
	)	Criminal No. 82-315
v.	)	
	)	
FRED GLOVER	)	

MEMORANDUM OPINION AND ORDER

Defendant is before the court charged with one count each of possession with intent to distribute heroin and cocaine, which are felonies in violation of 21 U.S.C. § 841(a), one count of carrying a firearm during the commission of a federal felony, 18 U.S.C. § 924(c), and one count of carrying a pistol without a license in violation of 22 D.C. Code § 3204. Defendant seeks to suppress, as the product of an illegal arrest, the gun seized from him on September 24, 1982, when F.B.I. agents arrested him believing that defendant was Larry Mathis, a fugitive. Defendant also seeks to suppress, as a product of an illegal search, the heroin and cocaine seized from the apartment of a third person, where officers believed Mr. Mathis was hiding. This court held a two-day evidenciary [sic] hearing on the motion to suppress and entered its oral findings and ruling at the conclusion of the testimony. The court held the government had met its burden as to the reasonableness of the arrest, albeit a case of mistaken identity, and denied defendant's motion to suppress the loaded pistol found on him. Additionally, the court ruled the defendant had a reasonable expectation of privacy in the apartment which had been the subject of a warrantless non-consensual search by the F.B.I. and granted the defendant's motion to suppress the narcotics seized therein. The following findings of fact and conclusions of law supplement the earlier oral opinion.

Since the reasonableness of the agents' arrest of Fred Glover must be evaluated in light of all the circumstances surrounding

that arrest, *United Staets v. Allen*, 629 F.2d 51 (D.C. Cir. 1980), a summary of the events which led up to the September 24, 1982 arrest is helpful. Larry Mathis, along with two other defendants, Eddie Mathis, who is Larry's brother, and Harry Jackson, were charged with the September 25, 1981 first degree murder of Mark Jackson. Beginning in May, 1982, an informant advised the United States Attorney that Larry Mathis knew he was going to be indicted and planned to hire an individual to kill the prosecutor in the case.[1] Fred Glover, an associate of Larry Mathis, was also identified as one of the persons possibly involved. The F.B.I. became involved in the investigation of Larry Mathis because of these threats. Detective Robert Lee of the D.C. Metropolitan Police Department testified that beginning in May, 1982 the F.B.I. agents were provided with pictures of both men as well as several other known associates of Mathis. While Eddie Mathis and Hary Jackson were apprehended in connection with the murder case, Larry Mathis remained at large. On July 30, 1982, a bench warrant was issued by the D.C. Superior Court for Larry Mathis. Within a week, Detective Lee, an officer with twenty-one years general experience as a D.C. police officer and ten years of specialized experience in the Intelligence Division of the force, who had known Larry Mathis for over fifteen years, sent a nationwide teletype lookout for Mathis. The lookout described Larry Mathis as a negro male, with date of birth November 19, 1951, 5' 11" tall, weighing 180 pounds, with short black hair, short beard and mustache. The teletype also stated that Larry Mathis was wanted for first degree murder and should be considered armed and extremely dangerous. Detective Lee testified that on September 15, 1982, an informant advised him that he had seen Larry Mathis driving a dark car with D.C. tags 736-798. The license tags were traced to a Dodge Challenger owned by Ms. Susie Herring who lived at 429 N St., S.W., Apt. 501. On September 17, 1982, this information was communicated to

[1]The threats were directed at A.U.S.A. William O'Malley, the prosecutor assigned to the Grand Jury which was investigating the Mark Jackson murder.

F.B.I. agents during a meeting at the offices of the United States Attorney. Additionally, the F.B.I. received the same information from the informant as given to Detective Lee. Detective Lee testified that on September 22, 1982, at approximately 7:00 P.M. he spotted Larry Mathis driving the Dodge with those tags. He radioed to the F.B.I. and Metropolitan Police Department and followed the vehicle but lost it in traffic. Pursuant to discussions with the F.B.I. at the September 17, 1982 meeting, Detective Lee agreed to stay away from Ms. Herring's apartment complex since if Larry Mathis saw him there his suspicions would be aroused and he might not return.

Special Agent John Heick, who worked on the F.B.I.'s Fugitive Squad and had seven years experience, testified that on September 20, 1982, he and other F.B.I. agents began developing their own source in the neighborhood of the Tiber Island apartment complex. Agent Heick testified that this citizen source had no prior convictions, was in a position of trust and confidence, and was able personally to view events at the apartment. He testified that on September 20, 1982, the source either corroborated or supplemented the following information previously possessed by the F.B.I. and M.P.D.: (1) on September 20, 1982, the source saw someone driving the Dodge Challenger drop Ms. Herring off at her apartment; (2) when shown an M.P.D. photo of Larry Mathis, the source advised that he had seen that man driving the Challenger and entering the apartment. When shown a picture of Glover, the citizen source advised that he had seen Fred Glover there also but was not aware of any other black males going to the apartment. Agent Heick testified that the source did not indicate if one individual frequented the apartment more than the other. On September 22nd, 23rd and 24th, 1982, F.B.I. agents spot-checked the area of the apartments at 429 N St., S.W. during the day and set up surveillance of that area from approximately 5:30 P.M. to 12:00 A.M. Special Agent Deborah Martin, and F.B.I. agent with two and one-half years experience in the Bureau, who was investigating Larry Mathis in connection with the alleged threats against AUSA O'Malley, testified that after

September 17, 1982, she worked together with Agent Heick, who sought Mathis on the first degree murder warrant. Agent Martin testified that on the morning of September 22, 1982, all of the F.B.I. agents working on the Larry Mathis case agreed that with the upcoming trial of the Jackson murder, they would make an all-out effort to find Larry Mathis. They canvassed all the areas Mathis was known to frequent to no avail.[2] Agent Martin testified that on September 2,4 1982, at approximately 6:00 P.M. she heard a call from Agent Heick over the radio that Mathis ws spotted at 429 N St., S.W. When Agent Heick failed to respond promptly, Agent Martin drove to that location, which was less than five minutes away from her. She testified that when she arrived she saw the black Dodge parked in front of the apartment. Agent Martin parked in the opposite direction, down the street about 10-15 car lengths away and for the next several minutes awaited the arrival of other F.B.I. agents. After several minutes, through her rearview mirror Agent Martin saw a negro male leaning face forward against the car on the side of the car nearest the sidewalk but facing the street. From this vantage point Agent Martin could thus see the left side of the individual leaning against the car. She testified that he either stood by the car or leaned against it for up to ten minutes and she got the impression, by the way he lounged on the car, that he either owned the car or had some connection with it – i.e., he acted as if he had some proprietary interest in the car. Agent Martin testified that another F.B.I. agent, Special Agent Mardigian, advised her that the individual was Larry Mathis. Agent Martin testified that then a white Mercedes pulled up beside the Dodge and the man who had leaned against the Dodge climbed into the back seat of the Mercedes which began to drive away.

Special Agent George Chmiel, an F.B.I. agent for twelve years, was working in the FBI's Washington Field Office when he received a radio call from Agent Martin on September 24, 1982; he then responded to 429 N St., S.W. Agent Chmiel

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[2]All the agents had pictures of both Larry Mathis and Fred Glover. They testified the faces depicted therein were not similar.

testified that he parked his car in a lot approximately 30 yards to the west of, but facing, the Dodge Challenger. Agent Chmiel testified that at 7:00 P.M. he received a call from Agent Mardigian that the subject was standing next to the car. Agent Chmiel testified that he saw a negro male standing beside the car and sitting on the back of the car and that from what he could see that individual matched Larry Mathis as to height and weight.

Agent Stephen Mardigian, an F.B.I. agent for seven years, testified tht he was seeking Mathis in connection with the fugitive investigation and responded to the area of 429 N St., S.W., approximately 15-20 minutes after he received the call on September 24, 1982 at 6:15. When Agent Mardigian arrived, he contacted the citizen source he had developed with Agent Heick who advised him that the fugitive had come into the building wearing a dark green leather jacket and a brown felt hat and had gone up to apartment 501 in the building. Agent Mardigian testified that he knew that the person who lived at that apartment owned the Dodge. Agent Mardigian testified that when he had the car he was in drive by to take a look at the area, he had only expected to see the Dodge parked in front of the apartment and was surprised to see anyone standing beside it. He testified that though he was 10-15 feet away, he could only view the individual from the shoulders up. Agent Mardigian testified that it was dusk and quite dark but the man he saw resembled Larry Mathis as to height, weight and general appearance. He did state he thought the man was 5' 6" to 5' 7" but later on cross-examination stated that was wrong. Based on his concern as to the identity of the individual who was wearing neither a green jacket nor a felt hat, he re-contacted the citizen source via the radio phone in his car and asked him whether the fugitive had left the building. The citizen source said the fugitive had left. Agent Mardigian testified that the citizen source then confirmed that the subject had left the building not wearing the hat or coat. Agent Mardigian testified that as he was speaking to the source Agent Chmiel called to advise that a white Mercedes had pulled up to the Dodge and the individual who had been leaning against the Dodge had climbed into the back seat of the

Mercedes, which was leaving. At that point, Agent Mardigian ordered the other agents to stop the Mercedes. Agent Martin pulled her car in front of the Mercedes to block it. Agent Chmiel approached the Mercedes, placed his gun inside the driver's open side window, pointed it at the man in the back seat and said, "F.B.I. Don't move, Mathis." In accordance with FBI procedures for the initial detention of armed suspects, the suspect was told to get out of the car and to lie face down on the ground. Afterwards, when he was being helped to his feet by the agents, they observed the butt of a gun protruding from his waistband. The gun was taken from the subject.

One of the agents obtained his driver's license. Agent Chmiel testified that it was only at this point when he compared the photo on the license with the individual before him that he realized that the man they had arrested was not Larry Mathis.

* * *

I. MOTION TO SUPPRESS THE GUN

Under *Hill v. California,* 401 U.S. 797 (1971), the arrest of an individual in the belief that the ndividual is another whom the officers seek to arrest, is not invalid if two criteria are met. First, the officers must have probable cause to arrest the individual they seek, and second, they must have had a reasonable and articulable basis for believing that the arrestee was the person they sought. Applying the facts in this case to the standard in *Hill,* it is clear that the first prong of the *Hill* test is met. The officers had probable cause to arrest Mathis; he had been indicted by a Grand Jury and the officers possessed a warrant for his arrest for murder.

The court recognizes that the subjective good-faith belief of the officers is insufficient to validate the arrest. *Hill, supra,* at 804. Rather, the court must consider the totality of the circumstances surrounding the arrest. *United States v. Allen,* 629 F.2d 51, 56 (D.C. Cir. 1980), to determine if those facts would provide a reasonable basis for the officers' belief that the arrestee is the person they were seeking. Consideration of the

totality of the circumstances requires that the facts before the arresting officer must not be dissected and viewed singly; they are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training. *United States v. Young,* 598 F.2d 296 (D.C. Cir. 1970). The agents' decision to arrest Fred Glover was based not only on their own observations but on the observations of two citizen informants. Furthermore, many of the details provided by the informants were later corroborated by the officers and agents investigating the case. The officers believed that the individual standing by the Dodge Challenger was the fugitive Larry Mathis based on the following facts: (1) They had received information from a citizen informant that Mathis had been seen driving a Dodge with D.C. tags 736-798; (2) a MPD police officer who had know Larry Mathis for over 15 years had later spotted Larry Mathis driving the same car; (3) the car was traced to a woman who lived at 429 N St., S.W., apartment 501; (4) a citizen source developed by the F.B.I. in that neighborhood advised after viewing pictures of Larry Mathis and Fred Glover that it had seen both men going into the building and into apartment 501 and using the car; (5) the officers had viewed the area for four days and nights, had not seen either Mathis or Glover, and had not arrested anyone else; (6) they received information on September 24, 1982, from the informant that it had seen Mathis and the car and that Mathis was in the apartment; (7) from the vantage point of the agents in the twilight conditions, who had to keep a reasonable distance to prevent their own detection, Fred Glover generally resembled Larry Mathis: both men were dark complected and had short hair, although Fred Glover did not have a beard. While the officers' own observations or the informants' information may not have *independently* provided a sufficient basis for the officers to mistake Glover for Mathis, the informants' information, corroborated by the officers' observations combined to provide such a sufficient basis.

Logically, any information which may have caused the officers to question whether Fred Glover was Larry Mathis must

also be considered in determining whether the agents' arrest was reasonable. The court has reviewed the pictures of Fred Glover and Larry Mathis and agrees with the agents who testified that, in their pictures, these individuals do not look alike. Other facts which caused them to question were that Mathis was two inchest (*sic*) shorter and ten pounds heavier than Glover and had a beard. It should be noted, however, that from a distance these differences may not have been as discernable. Additionally, Agent Mardigian testified that when he spotted the individual leaning against the Dodge, he noticed that the individual was not wearing a green leather jacket or a felt hat as the informant had described. Agent Mardigian responded by recontacting the citizen source and questioning the discrepancy which was satisfactorily answered by the citizen source believed reliable. Immediately thereafter the agents had to move to stop the departing Mercedes. Courts have suggested that under circumstances such as these, an interim investigation by the officers is the appropriate procedure. *See United States v. Allen,* 629 F.2d 51, 59-60 (D.C. Cir. 1980) (Bazelon, J., dissenting). In *Sanders v. United States,* 339 A.2d 373, 379, the D.C. Court of Appeals stated,

"Should doubt as to the correct identity of the subject of the warrant arise, the arresting officer obviously should make immediate reasonable efforts to confirm or deny the applicability of the warrant to the detained individual. If, after such reasonable efforts, the officer reasonably and in good faith believes that the suspect is the one against whom the warrant is outstanding, a protective frisk pursuant to the arrest of that person is not in contravention of the fourth amendment."

When questioned, the citizen source advised Agent Mardigian that the fugitive had left the apartment building without a hat or coat. Based on this information, Agent Mardigian could reasonably reaffirm his belief that the individual he saw standing by the car was Larry Mathis.

Based on the nature and extent of the information known to the officers at the time of their arrest of Glover, the court

distinguishes *United States v. Rosario,* 543 F.2d 6 (2nd Cir. 1976, cited by defendant in support of his motion to suppress. In that case, police officers had been seeking a known narcotics dealer named Gonzales and had a limited description of his accomplice, "Angel." When Gonzales was arrested, an individual present identified himself as Angel; he was subsequently arrested and searched and packets of heroin were retrieved from his jacket pocket. The officers later discovered that they had arrested the wrong "Angel." In *Rosario,* the court found that the officers did not obtain enough information to have probable cause to arrest Angel Rosario, and furthermore, the search of Rosario was impermissible under *Terry v. Ohio,* 392 U.S. 1 (1968), since the officers lacked an indication that Rosario was armed and dangerous. *Rosario, supra,* at 8 & n.2.

Considering their demeanor, experience, the photographic exhibits of the apartment complex and street area and the above facts, the court finds Detective Lee and the FBI agents to be credible witnesses[3] and therefore finds that the totality of the circumstances in this case would support the agents' reasonable belief that the individual at the car was Larry Mathis. As the Court in *Hill, supra,* at 804, stated, "Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before the court the officers' mistake was understandable and the arrest a reasonable

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[3]At the suppression hearing, defense counsel presented Agent Mardigian with his prior testimony before the Grand Jury where he stated,

> ". . . he was seen getting into another car and leaving. We couldn't allow this to happen without identifying him. We couldn't allow a person wanted for murder to possibly get away. We had to stop the vehicle if for nothing more than just to ascertain whose identity that was." *See* Defendant's Exhibit 3.

The court finds that Agent Mardigian's testimony, as a whole, supports his reasonable belief that Fred Glover was Larry Mathis. This belief, though not certain, was probable, and thus satisfies the test in *Hill, supra.* His subsequent ordering of the FBI agents to stop the Mercedes was a reasonable response to the situation, wherein a believed armed murder fugitive was about to leave the area.

response to the situation facing them at the time"; *accord, United States v. McEachern,* 675 F.2d 618, 622 (4th Cir. 1982).

The Court therefore denies the motion to suppress the gun seized from Mr. Glover on September 24, 1982.

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No. 83-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRED M. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF FOR PETITIONER IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Once again our closely documented assault upon the court of appeals' errant opinion has been met with silence. See Pet. 12 n.4 While the government's refusal to answer the petition is intended, no doubt, to convey the notion that our effort has floundered at the threshold, petitioner instead views this inaction as but the studied means to

avoid a difficult encounter. We consider this to be the correct angle of vision, because the government's no response response necessarily concedes, for present purposes, each and every error alleged in the petition. In this context, briefing skills would be exhausted by an attempt to defend, *inter alia,* an opinion bottomed on the assumption that two black males look alike, when a portion of the record sequestered by the lower court conclusively establishes that they do not even resemble each other. Accordingly, the government's unwritten, disturbing suggestion that the Court should also silently close ranks behind the court of appeals by denying the petition, deserves to be rejected. For that sought after result would surely generate the untoward appearance of a self-insulating review process, unresponsive to the impact of legitimate criticism.

Respectfully submitted,

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